

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

2/1/78
By mail

77-1311

To be argued by
Jack Kaplan

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 77-1311

UNITED STATES OF AMERICA,

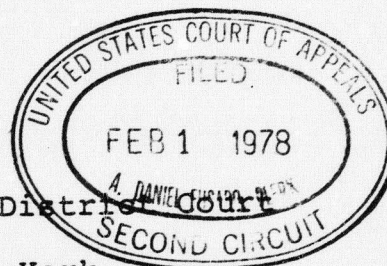
Appellee,

-against-

SOL R. RAUCH, MARC RAUCH and
LAWRENCE CORSA,

Defendants-Appellants.

Appeal From Judgment of The United States District Court
For The Eastern District of New York



BRIEF OF DEFENDANT-APPELLANT
LAWRENCE CORSA

Peter J. Romatowski
Jonathan D. Britt
Carter, Ledyard & Milburn
of Counsel

JACK KAPLAN
Attorney for Defendant-Appellant
Lawrence Corsa
2 Wall Street
New York, New York 10005
(212) 732-3200

January 31, 1978

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.	1
Statement of Facts	2
ARGUMENT	
Point I: The Evidence Was Insufficient	6
Point II: The Charge Was Inadequate. It Failed To Direct The Attention Of The Jury To The Material Issues In The Case. It Was Confusing, And Permitted The Jury To Convict On Insufficient Evidence. It Was Erroneous In Other Material Respects. .	14
Point III: It Was Error For The Trial Court To Refuse To Comply With The Jury's Request For Supplemental Instruction On Willful Intent	18
Point IV: The Trial Judge Failed In His Duty To Assure Himself That Corsa Knew What He Was Doing And Was Acting Voluntarily When He Dispensed With The Assistance Of Counsel With Respect To The Most Important Issue In The Case. Corsa Had A Meritorious Defense To The Charge Of Fraud, But It Was Not Adequately Presented Because His Attorney Was Incompetent and Unprepared.	25
Point V: Corsa's Waiver Of Indictment Was Not Voluntary	36
Point VI: The Chart Which Sets Forth The Government Expert's Opinion As To The Grading And Value Of The Coins, The Manner In Which It Was Used, And The Failure Of The Trial Judge To Give Any Cautionary Instruction Whatsoever, Unfairly Prejudiced The Defendant On the Most Important Issue In The Case	42

TABLE OF CONTENTS
(continued)

	<u>Page</u>
Point VII: An Inflammatory And False Remark By The Prosecutor In Summation Requires Reversal.	47
Point VIII: Prejudicial Hearsay Testimony Was Elicited By The Prosecutor On Direct Examination Of The Receiver Appointed For FCR Long After The Alleged Scheme Had Terminated.	49
Conclusion	50

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Berger v. United States</u> , 295 U.S. 78 (1935)	48
<u>Bollenbach v. United States</u> , 326 U.S. 607 (1946) .	22-23
<u>Cooper v. Fitzharris</u> , 551 F.2d 1162 (9th Cir. 1977)	33
<u>Gerstle v. Gamble-Skogmo, Inc.</u> , 478 F.2d 1281 (2d Cir. 1973)	15
<u>Gordon v. United States</u> , 438 F.2d 858 (5th Cir.), <u>cert. denied</u> , 404 U.S. 828 (1971)	42, 45-46
<u>Holland v. United States</u> , 348 U.S. 121 (1954)	42-43, 44
<u>Johnson v. United States</u> , 506 F.2d 640, 646 (8th Cir. 1974), <u>cert. denied</u> , 420 U.S. 978 (1975)	33
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938)	37, 38
<u>Jordon v. Bondy</u> , 114 F.2d 599 (D.C. Cir. 1940) . .	21
<u>Jordon v. United States</u> , 84 F.2d 64 (D.C. Cir. 1936)	22
<u>Marzullo v. Maryland</u> , 561 F.2d 540 (4th Cir. 1977)	33
<u>Moore v. United States</u> , 432 F.2d 730 (3d Cir. 1970)	33
<u>Rickenbacker v. Warden</u> , 550 F.2d 62 (2d Cir. 1976)	34
<u>Securities and Exchange Commission v. Brigadoon Scotch Distributors, Ltd.</u> , 388 F.Supp. 1288 (S.D.N.Y. 1975)	3

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
<u>Cases:</u>	
<u>TSC Industries, Inc. v. Northway, Inc.,</u> 426 U.S. 438 (1976)	15-16
<u>United States v. Bolden, 514 F.2d 1301</u> (D.C. Cir. 1975)	23
<u>United States v. Burse, 531 F.2d 1151</u> (2d Cir. 1976)	48
<u>United States v. Clark, 475 F.2d 240</u> (2d Cir. 1973)	40
<u>United States v. Curtiss, 330 F.2d 278</u> (2d Cir. 1964)	48
<u>United States v. Dardi, 330 F.2d 316</u> (2d Cir. 1969), <u>cert. denied</u> , 379 U.S. 845 (1965)	48
<u>United States v. DeCoster, 487 F.2d 1197</u> (D.C. Cir. 1973)	33
<u>United States v. DiDonato, 301 F.2d 383</u> (2d Cir.), <u>cert. denied</u> , 370 U.S. 917 (1962)	23, 24
<u>United States v. Dixon, 536 F.2d 1388</u> (2d Cir. 1976)	6
<u>United States v. Ellenbogen, 365 F.2d 982</u> (2d Cir. 1966), <u>cert. denied</u> , 386 U.S. 923 (1967)	46
<u>United States v. Goldberg, 401 F.2d 644,</u> (2d Cir. 1968), <u>cert. denied</u> , 393 U.S. 1099 (1969).	46
<u>United States v. Fessel, 531 F.2d 1275</u> (5th Cir. 1976).	33

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
<u>Cases:</u>	
<u>United States v. Hall</u> , 346 F.2d 875 (2d Cir.), <u>cert. denied</u> , 382 U.S. 910 (1965).	22
<u>United States v. Lanni</u> , 335 F.Supp. 1060 (E.D. Pa. 1971), <u>aff'd</u> 466 F.2d 1102 (3rd Cir. 1972)	22
<u>United States v. Macklin</u> , 523 F.2d 193 (2d Cir. 1975).	40-41
<u>United States v. Miller</u> , 546 F.2d 320 (9th Cir. 1976)	23
<u>United States v. Natelli</u> , 527 F.2d 311 (2d Cir. 1975), <u>cert. denied</u> , 425 U.S. 934 (1976).	16
<u>United States v. Nathan</u> , 536 F.2d 988 (2d Cir.), <u>cert. denied</u> , 429 U.S. 930 (1976).	45
<u>United States v. Pandilidis</u> , 524 F.2d 644, (6th Cir. 1975), <u>cert. denied</u> , 424 U.S. 933 (1976).	40
<u>United States v. Pfingst</u> , 477 F.2d 177 (2d Cir.), <u>cert. denied</u> , 412 U.S. 941 (1973).	21
<u>United States v. Plattner</u> , 330 F.2d 271 (2d Cir. 1964).	26
<u>United States v. Regent Office Supply Co.</u> , 421 F.2d 1174 (2d Cir. 1970).	6,9,14-15
<u>United States v. Robinson</u> , 543 F.2d 951 (2d Cir.), <u>cert. denied</u> , ___ U.S. ___, 97 S.Ct. 139 (1976)	48
<u>United States v. Sacco</u> , 563 F.2d 552 (2d Cir. 1977).	26

TABLE OF AUTHORITIES

(continued)

Page

Cases:

<u>United States v. Spagnolo</u> , 546 F.2d 1117 (4th Cir. 1976), <u>cert. denied</u> , ___ U.S. ___, 45 USLW 3836 (1977)	24
<u>United States v. Tolliver</u> , Nos. 77-1017, 77-2055 (2d Cir. Jan. 3, 1978)	34
<u>United States v. Toney</u> , 527 F.2d 716 (6th Cir. 1975)	33
<u>United States v. Wight</u> , 176 F.2d 376 (2d Cir. 1949), <u>cert. denied</u> , 338 U.S. 950 (1950)	33
<u>United States v. Yanishefsky</u> , 500 F.2d 1327 (2d Cir. 1974)	34
<u>United States ex rel. Marcelin v. Mancusi</u> , 462 F.2d 36 (2d Cir. 1972)	34
<u>United States ex rel. Williams v. Twomey</u> , 510 F.2d 634 (7th Cir.), <u>cert. denied</u> <u>sub nom. Sielaff, Corrections Director</u> <u>v. Williams</u> , 423 U.S. 876 (1975)	33

United States Constitution

Fifth Amendment	37
---------------------------	----

Statutes

Title 18, United States Code	
Section 2	2
Section 1341.	2, 6
Section 3651.	2
Federal Rules of Criminal Procedure	
Rule 7(b)	37
Rule 52(b)	46

TABLE OF AUTHORITIES

(continued)

Page

Other Authorities

8 <u>Moore's Federal Practice</u> ¶7.03[2], pp. 7-13 to 7-14 (2d Ed. 1977 Rev.)	37-38
--	-------

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 77-1311

UNITED STATES OF AMERICA,
Appellee,

-against-

SOL R. RAUCH, MARC RAUCH and
LAWRENCE CORSA,

Defendants-Appellants.

Appeal From Judgment of The United States District Court
For The Eastern District of New York

BRIEF OF DEFENDANT-APPELLANT
LAWRENCE CORSA

Preliminary Statement

Lawrence Corsa appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on July 7, 1977.

Information 77 Cr. 308(S) charged Corsa and three co-defendants in 15 counts with mail fraud in violation of Title 18, United States Code, Sections 1341 and 2. A13-A19.*

Trial before Hon. George C. Pratt, United States District Judge for the Eastern District of New York, and a jury began on February 23, 1977 and concluded on April 11, 1977 with a guilty verdict on all but one of the counts.

Defendant was sentenced on July 7, 1977 to a three-year term of imprisonment on all counts concurrently under the "split sentence" provisions of Title 18, United States Code, Section 3651, six months to be served in a jail-type institution and the balance to be spent on probation. In addition, defendant was fined \$2,800 (\$200 on each count). Defendant is enlarged on a \$5,000 personal recognizance bond pending the outcome of this appeal.

Statement of Facts

Lawrence Corsa was a 21-year old junior college drop-out in November, 1973 when his father-in-law, co-defendant Sol Rauch, and his brother-in-law, co-defendant Marc Rauch, induced him to work as buyer and cataloguer for a rare coin mail order business founded a few months earlier by his uncle-in-law, Sol's brother Harold Rauch, and another man, clients of

*"A" citations are to the defendants' Joint Appendix.

the elder Rauch, an attorney. (Tr. 3209-10, 2480, 2489-90, 405-6, 3212, 2181-4).*

Grandiosely named "Federal Coin Reserve, Inc." ("FCR"), the business sold authentic rare coins for the next eleven months, until the Securities and Exchange Commission obtained a federal court injunction closing it down on the ground that the purchase orders were unregistered "investment contracts" within the meaning of the securities laws (the SEC's expansive theory being that FCR's sales appeal was to persons interested in the investment value of the coins (a value which is sometimes shared with other artifacts such as postage stamps, oriental rugs, antiques, fine art, and the like) rather than to hobbyists) (Securities & Exchange Commission v. Brigadoon Scotch Distributors, Ltd., 388 F. Supp. 1288 (S.D.N.Y. 1975)).

Corsa's job was to buy the coins from dealers for resale at mark-ups of 40-55%, to write or edit descriptions of the coins prepared by the dealers, and to fill orders when payment was complete. He played virtually no part in preparing the written sales brochures or in training or supervising the salesman, although he did assist the younger Rauch in editing the original brochure prepared by the founders of the company to eliminate, inter alia, references susceptible of

* "Tr." citations are to the trial transcript.

passing off FCR as an official agency of the Government.

The job was congenial to Corsa, for he had collected coins as a hobby for eleven years, since he was 10; but he worked hard (50 hours a week) for little money (approximately \$276 a week). (Tr. 2692, 2917, 3212-6, 405-6, 2549, 3221).

FCR's sales material contained three groups of statements alleged in the information to be fraudulent:

(1) the coins were authentic, correctly graded, and priced at current market value; (2) delivery would be made in 4-6 weeks, and full refunds would be given to dissatisfied customers under certain circumstances; (3) FCR was large, established, well-financed, had a large inventory, received expert numismatic advice from a non-existent entity, would assign each customer to an individual "account executive," and would render semi-annual statements of account. (A15-A16).

The first group of representations was not proved to be false. The authenticity of the coins was conceded. The Government's expert testified that he would have given them lower grades than FCR's dealers and Corsa gave them, but acknowledged that the system by which FCR had graded them was in standard use in the industry, and based his testimony on his own system, which he thought was superior. The Government's expert testified that FCR's average mark-up over retail market price at the time of sale, in his opinion,

was 118%; but he acknowledged that retail prices charged by competing dealers selling putatively identical coins varied far more than 118% (the variation in the coin prices introduced in the record ranged from 300% to 700%) and that there was no such thing in the rare coin industry as a uniform mark-up: "As to the value, I can't tell somebody what to pay for the coin. That's between the buyer and the seller. . . . There is no rule that says what the percentage is supposed to be" (Tr. 1486-1503, 3224, 1614, 1965-6, 1550-1, 1559-60, 1675).

As for the second group of representations, the evidence of failure to deliver or make refunds was weak and it was not linked to Corsa or to a consistent pattern of conduct. Some persons did not get their coins or their refunds, but others did. The Government's only "inside" witness, sales manager Al Cito, testified that the lag in paying bills and making deliveries and refunds began at four weeks and grew to six weeks and then to eight weeks by the month before the SEC injunction. The circumstantial evidence was as consistent with an innocently failing business as it was with a fraudulent scheme. Government witness Cito, even though he had been fired by FCR, testified that in his opinion Corsa did not intend to cheat FCR customers out of their money (Tr. 73-4, 315-8, 406-7, 423, 467).

The third group of representations was proved to be false, but was not shown to be material.

ARGUMENT

Point I

The Evidence Was Insufficient.

In United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970) this Court held that "solicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain" does not constitute a "scheme to defraud" or "obtaining money by false pretenses" within the prohibition of 18 U.S.C. § 1341, id. at 1179; that the Government has "the burden of showing that some actual harm or injury was contemplated" by the defendants, id. at 1180; and that there is no crime of mail fraud "[i]f there is no proof that the defendants expected to get 'something for nothing'. . . or that they intended to get more for their merchandise than it was worth to the average customer," id. at 1181 (emphasis deleted). See also, United States v. Dixon, 536 F.2d 1388, 1400 (2d Cir. 1976).

The representations directed to the "quality, adequacy, or price . . . or otherwise to the nature of the bargain" which were charged in the information were the following (¶5):

- c) That Federal Coin Reserve, Inc. would repurchase

customers' coins for at least the price paid;

d) That coins purchased from Federal Coin Reserve, Inc. were priced at their current market value;

* * *

i) That coin portfolios . . . were guaranteed as to their authenticity and grade;

* * *

h) That customers would receive their coins within four to six weeks from the date of purchase (A16).

The evidence was insufficient to establish that these representations were false or that Corsa knew they were false.

The coins were conceded to be authentic. (And valuable. One of the "victim" witnesses would not remove the coins he bought from FCR from his vault for examination by the Government's expert until he brought them with him to New York for the trial (Tr. 1480)).

Rare coins simply do not have a precisely ascertainable market value. Unlike stock of, say, General Motors, they are not fungible and they are not publicly traded in volume at reliably reported prices.* Putatively identical coins are publicly offered for sale by competing dealers at widely divergent prices (300% to 700%) (Tr. 1550-1, 1559-60).

The Government's expert acknowledged that the value

* The Government's expert testified that, "It is impossible to get a specific date and match it exactly to a transaction, but we are not in a stock market-type business where it fluctuates daily up and down... There is no system of being able to record all of this. We have to use general knowledge that is available to us" (Tr. 1472-3).

of rare coins is substantially indeterminable:

"As to the value, I can't tell somebody what to pay for the coin. That's between the buyer and the seller" (Tr. 1675).

The Government's expert also acknowledged that there was no standard or uniform price mark-up:

"There is no rule that says what the percentage is supposed to be.

* * *

"Q In other words, there is no set percentage that a person should buy coins at and sell them at?

"A I would say that there couldn't be a fixed one, no" (Tr. 1675-6).

This was corroborated by the only FCR supplier who was called to testify:

"Q What is a reasonable mark-up from wholesale to retail?

"A There is no specific mark-up. It can be ten percent, ten thousand percent, depending on the base cost of the coin, the coin itself, market fluctuation, and conditions, and what the market might bear" (Tr. 2663).

The Government made no effort to prove what mark-up was applied by FCR. The defense showed from documents that the mark-up on the coins sold to one "victim" was 40% (Tr. 2691-2). Marc Rauch testified that the mark-ups ranged from 40% to 55% (Tr. 2917).

The Government's expert testified that the average

price charged by FCR for the 19 coins sold to the "victim" witnesses was, in his opinion, 118% over the retail price at the time of sale (Tr. 1486-1503).

The disparity between the expert's opinion of value and the FCR price is substantially less than the disparity between the offering prices on the putatively identical coins demonstrated at trial (Tr. 1550-1, 1559-60).

The range of uncertainty in the Government's own proof of current market value, the absence of any standard mark-up in the industry, and the modest mark-up in fact applied by FCR, preclude any finding that FCR was defrauding its customers by charging too high a price.

Misrepresentations as to value, to be criminally fraudulent, must be "gross"; the defendants must represent "that the property [is] worth much more than they [know] it [is] in fact worth." Regent Office Supply, supra, 421 F.2d at 1181. There was no evidence whatever that this was the fact or that Corsa had such guilty knowledge.

The value of a rare coin depends in part on its grade, i.e. its state of preservation.

The Government's expert, a noted dealer, asserted that there is an objective standard of grading; but his testimony reveals that the fact is precisely the opposite:

"[I]n my opinion, there is unquestionably an objective means of grading. There is a distinct difference of wear within each of these categories. There are those who propose there are others, that there are variables within categories and we -- I fail to consider them subjective because it is in the eye of the beholder" (Tr. 1466-7; emphasis added).

* * *

"Q Mr. Stack, what do you base your grading on?

"A Experience, handling, ability to know what the coin looked like when it was uncirculated, be able to grade it in degrees below what it was when it was made" (Tr. 1567).

* * *

"[T]here are differences of opinion in grading in the business" (Tr. 1602).

* * *

"Q Do you disagree that people grade coins differently?

"A I agree People grade by experience" (Tr. 1635-6).

FCR, in its grading, repeated or reduced the grades affixed by its vendors, utilizing two industry guides, Photo Grade and Brown & Dunn. (Tr. 2693-5, 2712-4). The Government's expert acknowledged that these guides were standard in the industry (Tr. 1614, 1632-5), admitted that he used them himself sometimes (Tr. 1923), but disparaged them as being less worthy than his own "system":

"The Photo Grade system is a tool that some of us use that have not had enough experience as I have had to have seen millions upon millions of coins and therefore I am able to catalogue them from my own head and keep a picture of what they're supposed to look like without actually having to go to a book and look them up (r. 1966).

* * *

"Q Mr. Stack, do you recognize this book entitled, "A Guide to the Grading of United States Coins," written by Martin Brown and John Dunn?

"A Yes.

"Q Do you recognize Mr. Brown or Mr. Dunn as being experts in coin grading?

"A I consider them having made a valid and valiant attempt to try to provide a book on grading.

"Q But you don't recognize them as experts?

"A No, because I find deficiencies in the book.

"Q This book, Mr. Stack, is one of the, or constitutes a second system of grading used by many dealers and collectors in the United States; is that correct?

"A I don't recall, I don't think you can call it a system. I think you can call it a tool.

"Q It is a tool and not a guide --

"A It is a tool, one of the many tools available to us.

"Q Do you recognize that many people use this?

"A I assume many people attempt to use it.

"Q Do you recognize that many people in advertisements say that they use Brown & Dunn solely?

"A I believe I have read that.

* * *

THE COURT: Is the book recognized in the coin industry as a photo-grade? You say it is a tool for grading?

THE WITNESS: A tool or a help. Yes.

THE COURT: In the same way that the photo-grade --

THE WITNESS: In the same similar fashion, yes.

THE COURT: Is it a different approach to the process of grading coins?

THE WITNESS: There is a different approach in technique" (Tr. 1632-4).*

There was no proof that the FCR grades were inconsistent with the concededly standard guides on which FCR relied.

Grading is subjective, indeterminate, indefinite and imprecise. It is unacceptable to ground a felony conviction on the opinionated testimony of a noted dealer in an area that by any fair test is largely speculative.

Inasmuch as FCR always repeated or reduced the grades assigned by its vendors, and utilized two standard grading systems in doing so, the evidence was insufficient to prove that Corsa knew or had reason to know that the grades FCR assigned to the coins it sold were higher than the grades that

* The Brown & Dunn treatise, received in evidence (Tr. 1635), contains the following statement:

"The idea has prevailed among collectors and dealers that the grading of coins is a matter of personal opinion and that no two people will grade the same coin alike. This has been repeated so often that it has become axiomatic."

The Government expert testified that he disagreed with the statement. (Tr. 1635).

a cantankerous dealer would later assign to them in his testimony at trial.

Fifteen "victims" testified for the Government at the trial. Eight* received their coins, seven** did not. Thirteen asked for refunds, six*** got them in whole or in part. FCR had approximately 500 customers during its short life. "Hundreds" got their coins (Tr. 465). The SEC believed that 70 failed to get their coins or their refunds (Tr. 3300).

When it is considered that FCR's business was suddenly terminated by the SEC injunction, it is apparent that the proof of FCR's corporate, let alone Corsa's personal, intent not to honor their promise to deliver coins and make refunds was less than overwhelming. The pattern of conduct was not consistent and was not linked to Corsa, whose role was subordinate and peripheral.

* Aquilina (Tr. 50), Deresinski (Tr. 160), Spyropoulos (Tr. 640), Meyers (Tr. 246), Novak (Tr. 760), Pieroni (Tr. 1080), Taborsky (Tr. 585), Kozal (Tr. 547).

** Abbe (Tr. 326), Fisher (Tr. 617), Brackett (Tr. 697-9), Wisniewski (Tr. 116), Kemmann (Tr. 360), Calderone (Tr. 3267), Walter (Tr. 3360-1).

*** Wisniewski (Tr. 124-5), Aquilina (Tr. 62), Deresinski (Tr. 174), Spyropoulos (Tr. 647-8), Kemmann (Tr. 370), Abbe (Tr. 320).

Point II

The Charge Was Inadequate. It Failed To Direct The Attention Of The Jury To The Material Issues in the Case. It Was Confusing, And Permitted The Jury To Convict On Insufficient Evidence. It Was Erroneous In Other Material Respects.

The charge to the jury (Tr. 3627-77, A27-A77) was mechanical and cursory. Although the trial was long and the issues were subtle and complex, the judge merely read the information, the statute, and some standard instructions. The judge did not marshal the evidence or summarize the contentions of the parties. The judge did not vivify the abstract principles of law with reference to the facts of the case.

The jury was not told that proof of a gross disparity between the price and the value of the coins was a material element of the offense. This was error, United States v. Regent Office Supply Co., supra.

In a confusing portion of the charge, the jury was told in substance that it could convict if it found that the defendants knowingly made any one of the misrepresentations alleged in the information.* This was

* "While a number of false and fraudulent representations are alleged in the information, it is not incumbent upon the Government to prove each and every one of them, but it is incumbent upon the Government to prove one or more and in any case, a sufficient number of them to indicate and satisfy you beyond a reasonable doubt that the scheme alleged was actually set up.

"In summary, therefore, with respect to the representations alleged in paragraph 5 of the information, you must determine,

"1, whether the representation was made.

"2, if made, whether it was true or false, and

"3, if false, whether it was material" (Tr. 3650).

error, for absent proof of a gross disparity between price and value, many of those misrepresentations were not criminal, United States v. Regent Office Supply Co., supra.

The verdict is not saved by the court's unusual decision to instruct the jury on materiality, for the definition utilized by the court was far too lenient to pass muster even in a civil case under the securities laws. The court said,

"By material, I mean simply facts which could reasonably be expected to induce a person to decide whether to act or not to act and in this case to purchase or not to purchase coins from Federal Coin Reserve" (Tr. 3649-50).

A higher threshold for imposition of liability is required even in civil cases under the securities laws. This court, in such cases as Gerstle v. Gamble-Skogmo Inc., 478 F.2d 1281, 1301-2 (2d Cir. 1973) rejected a formulation defining as material those facts which a reasonable shareholder might consider important, and, in the language of the Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976), "opted for the conventional tort test of materiality -- whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." TSC Industries, Inc. itself suggested an even higher threshold, "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider

it important" in making his decision, 426 U.S. at 449 (emphasis added).

Nor is the verdict saved by the fact that conceivably there was proof of fraudulent misrepresentation of intent to make deliveries or refunds, even absent proof of gross disparity between value and price, because the non-criminal specifications, such as the representation that FCR was old and established, may have been the ones upon which the jury relied. The verdict is ambiguous, and the conviction must be reversed, e.g., United States v. Natelli, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976).*

The court charged that the jury could infer knowledge that misrepresentations were false, from reckless indifference or willful closing of the eyes.** Inso-

* In light of the incompetence of counsel, it is appropriate for this court to dispense with the requirement that there be specific objection below.

** "Knowledge may be proven by a defendant's conduct, since we have no way of looking into a person's mind directly. In this connection, bear in mind that one may not willfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law.

If you find from all the evidence, beyond a reasonable doubt, that a defendant believed that false or fraudulent representations may have been made by salesmen, or that representations which he knew were made may have been false or fraudulent, and if you further find that he deliberately and consciously tried to avoid learning that fact in order to be able to say, should he be apprehended, that he did not know, you may treat that deliberate avoidance of positive knowledge as the equivalent of knowledge.

In other words, you may find the defendant acted knowingly, if you find that either he actually knew of the false or fraudulent representations, or that he deliberately closed his eyes to what he had every reason to believe was the fact" (Tr. 3656-7).

far as Corsa is concerned, there is nothing in the evidence to justify such a charge. To the contrary, all indications were that he was conscientious and diligent, in supervision of FCR's sales force as in other matters (Tr. 2722-27).

In sum, the charge did not adequately direct the attention of the jury to the issues which were essential for it to consider before rendering a verdict, and the charge permitted the jury to return a guilty verdict on evidence of misrepresentations which themselves were not criminal.

Point III

It Was Error For The Trial Court
To Refuse To Comply With The Jury's
Request For Supplemental Instruction
On Willful Intent.

One and three-quarter hours after retiring to begin its deliberations, the jury sent in a note asking for a definition of willful intent (Tr. 3679).*

The trial judge professed to find the note partially illegible. He wondered if it might ask for a definition of wilfully "enter." He "wonder[ed] if it [was] from the right Jury" (id.).

The jury was called into court and the purport of the question was clarified (if clarification were needed):

THE COURT: Ladies and Gentlemen, I have your note which has been marked Court's Exhibit 11. I need some help. Who is your Foreman?

JUROR NUMBER ONE: I am.

THE COURT: You are Mr. White?

JUROR NUMBER ONE: Yes, Sir.

THE COURT: It says, "Can we have a definition of willfully," and I can't read the next word.

JUROR NUMBER ONE: It should be willfully intent.

JUROR NUMBER FIVE: Willful intent.

THE COURT: Is that a term which appears in the information?

* The transcript of this incident is reproduced at length in the Joint Appendix at A78-A90.

JUROR NUMBER ONE: I think it is the second page.

THE COURT: Paragraph One on Page Two of the information? Under the heading Count One through Five. It says commencing and so forth and continuing thereafter. The Defendants did knowingly and willfully devise and intend to devise. Is that it?

JUROR NUMBER ONE: That's right.

THE COURT: Your question is what do the words willfully and intend mean in that context?

JUROR NUMBER ONE: Yes, Sir. (Tr. 3681-2).

The trial judge should have given a supplemental instruction right then. Instead, surprisingly, the trial judge observed that it was 5:30 p.m. Friday afternoon, and invited the jury to request that it be permitted to recess and separate for the weekend:

THE COURT: All right. I'll hold that for a moment. I have to think about it for a bit.

It is now 5:30. We are at a stage of the case where our roles are somewhat reversed. The Jury is pretty much in control from what goes on from here in terms of your deliberation. We will largely be governed by what it is the Jury wishes to do.

We have several possibilities. We can continue deliberations today for as long as you care to deliberate. If you feel you are anywhere near your verdict, you may wish to do that. If you feel that you are not, then you may wish to consider the possibility of recessing.

That raises the question of when we resume. I would not permit you to deliberate on Sunday. But, if you wish to deliberate on Saturday, I will direct that it be done. If you wish to recess until Monday and resume your deliberations at that time, I would permit you to do that.

If your decision with respect to all of that is you wish to stop at this point and resume either tomorrow or Monday, then I would defer answering your question until you start, so that at least the answer to your question would be fresh in your minds.

If on the other hand, you wish to continue deliberations this afternoon or into the evening, then I will go right to work on what it is you had asked. (Tr. 3682-3).

The jury left, considered, and returned. The Foreman said, "We feel we can't make a decision tonight. But we would like to start fresh on Monday morning" (Tr. 3685-6). The trial judge thereupon excused them, and promised to give them the supplemental instruction they had requested the first thing Monday morning:

"Then we will recess at this point until 9 o'clock Monday morning.

At that time I will try to respond to your inquiry. . . . [When] you come back here Monday morning. . . I will call you into the Court Room just for the purpose of--first I'll call you in for the purpose of responding to your question. Then you'll resume your deliberations . . ." (Tr. 3686).

The trial judge did not keep his promise. Over the weekend, apparently, he decided that the purport of the question was not clear after all, and on Monday morning he summoned the jury and asked them to clarify it:

THE COURT: Good morning, Ladies and Gentlemen. Hope you had a nice weekend.

Back to the question which you asked on Friday, which I have marked Court's Exhibit 11, "Can we have a definition of willfully enter?"

There seemed to be some disagreement as to really what was intended to be asked.

I think before I attempt to answer the question I am going to ask you to go back into the Jury Room, the one in which you were deliberating, and write out a little more fully what it is you really want me to tell you. Then I will be able to respond to it, and there won't be guessing on my part, and you will also have the information that you want. So, if you will go in and do that, I will answer your question as quickly as I can, and then you can proceed with your deliberations (TR. 3690-1).

Not surprisingly, the jury, twice chastened and rebuffed, told the judge to forget it: "Please forget our request for explanation of information. Thank you." (Tr. 3693). And shortly thereafter, the uninstructed jury, its question unanswered, returned with its verdict of guilty (id.).

This was error. The trial judge should have answered the jury's question. "A trial judge should . . . provide prompt additional instructions upon request from a jury," United States v. Pfingst, 477 F. 2d 177, 197 (2d Cir.), cert. denied, 412 U.S. 941 (1973).*

* The issue in Pfingst was whether a 2-hour delay between request and response was error. In holding that it was not, the court "note[d] in passing" two decisions to the effect that juries can "waive" requests for further instructions (477 F.2d at 197).

The record does not support a finding of waiver in this case, and the two decisions cited are distinguishable.

In Jordon v. Bondy, 114 F.2d 599, 605 (D.C. Cir. 1940), the jury's question was addressed to the U.S. Marshal, who said the judge had gone home and would have to be sent for; in view of the late hour, the jury withdrew its request of the Marshal and resumed its

The trial judge's repeated requests for "clarification" were unfair and uncalled-for; they might well have been understood by the jury to constitute criticism for asking such a stupid question, when in fact the question cut to the heart of the case.

There was no mystery about the jury's question. The jurors "were experiencing the not uncommon layman's difficulty with the meaning of willfulness." United States v. Hall, 346 F.2d 875, 879 (2d Cir.), cert. denied, 382 U.S. 910 (1965).

A jury's request for supplemental instruction deserves respect, not criticism. "The jury's questions, and particularly the last written inquiry . . . clearly indicate that the jurors were confused. . . . Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give

deliberations. The judge was not made aware of the incident until the day after the verdict was returned, when the juror whose question it had been approached the judge in an effort to impeach the verdict. Jordon v. United States, 87 F.2d 64, 67 (D.C. Cir. 1936).

In United States v. Lanni, 335 F. Supp. 1060, 1083 (E.D. Pa. 1971), aff'd, 466 F.2d 1102 (3rd Cir. 1972) the jury's question was whether the evidence showed that the defendant had been in attendance at two certain meetings. The judge conferred with counsel, stated his intention to respond to the question by informing the jury that he could not answer since it was the jury's recollection of the evidence which governed, and was about to do so (55 minutes had elapsed) when the jury sent in a note that it had reached a verdict.

the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-613 (1946).

Convictions are reversed when supplemental instructions are too cursory (United States v. Bolden, 514 F. 2d 1301-9 (D.C. Cir. 1975) ("[W]hen a jury shows confusion, a trial judge is under an obligation to respond. . . 'The sample . . . charge was not meant to be and is not an inflexible directive to be followed by rote. It sketches the substance of what the judge should in some way convey to the jury.' Where, as here, the need for more appears, it is the duty of the judge to fill in the sketch'. . ."), especially where they are too long delayed. United States v. Miller, 546 F.2d 320, 323 n.2 (9th Cir. 1976) (a weekend intervened between the main charge and the request for supplemental instruction Monday morning). A fortiori, a conviction should be reversed when the judge simply refuses to honor the request and browbeats the jury until they abandon it.

This court, in finding that a trial judge erred when he refused to make explicit in the main charge a principle of law which was already implicit in it, has written that "a defendant . . . may justifiably complain when the court refuses to charge the correct law expressly, and thereby relies upon the jury's ability to infer it." United States v. DiDonato, 301 F.2d 383, 385 (2d Cir.), cert. denied, 370 U.S. 917 (1962).

Corsa's co-defendant Sol Rauch timidly wondered "if in light of the fact that a weekend went by . . . whether it's possible that a definition was obtained from the outside" (Tr. 3693). A fair question. One of the jurors was married to an attorney (Tr. 2/23/76*, at 3). The trial judge should not have left the jury adrift with their question unanswered in reliance upon their "ability to infer" (DiDonato, supra) the answer to a profound and central question of law.

United States v. Spagnolo, 546 F.2d 1117, 1119-20 (4th Cir. 1976) (per curiam), cert. denied, ___ U.S. ___, 45 U.S.L.W. 3836 (1977) is not authority to the contrary. That was a short, open-and-shut case of extortion and obstruction of justice. The jury was told their question would be answered, but did not bother to wait. This case, in contrast, is a long, close and subtle mail fraud case, and the jury did not withdraw their question until after twice being interrogated as to exactly what they meant. Moreover in Spagnolo, "[t]he original charge of the court fully covered the matter embraced within the [jury's] question. . . ." 546 F.2d at 1119, whereas in this case, the trial judge never defined the word "willful" (a fact which was worriedly acknowledged by the prosecutor (Tr. 3684)).

*"Tr." followed by a date denotes the transcript of the pre-trial proceedings held on the respective dates indicated.

Point IV

The Trial Judge Failed In His Duty To Assure Himself That Corsa Knew What He Was Doing And Was Acting Voluntarily When He Dispensed With The Assistance Of Counsel With Respect To The Most Important Issue In The Case. Corsa Had A Meritorious Defense To The Charge Of Fraud, But It Was Not Adequately Presented Because His Attorney Was Incompetent And Unprepared.

Without doubt the most important issue in the case was the fair market value of the coins.

We argue in Point I above that Corsa had a meritorious defense, namely, that the coins were correctly graded and fairly priced within a reasonable degree of certainty, given the absence of any definite and reliably ascertainable fair market value for specialty items such as rare coins.

Corsa was deprived of an adequate opportunity to present a defense, however. Corsa's trial attorney was, and admitted that he was, unqualified to cross-examine the Government's expert; failed to engage an expert for the defense to advise on the cross-examination or to testify for the defense; and did not interview or prepare the only independent witness the defense called who came anywhere near being in a position to shed light on the subject. The crucial cross-examination of the Government's

expert was conducted by Corsa's co-defendant, Marc Rauch, a junior college graduate, 25 years old at the time of trial, but not a lawyer and not a coin expert. Corsa consented to this procedure, but the trial judge utterly failed to fulfill his duty to caution Corsa that it was folly and to ascertain that Corsa's waiver of the right to counsel with respect to the most important issue in the case was voluntary.

The problem first came to the attention of the trial judge on the first day of trial, when Corsa's trial counsel, who had been in the case for thirteen months, approached the trial judge in chambers, said that "he does not feel that he has sufficient knowledge to conduct an appropriate cross-examination" of the Government expert who was expected to testify shortly, and requested leave of Court for the cross-examination to be conducted by Marc Rauch (Tr. 2232-4, 3583-6, 145).

It was the duty of the trial judge at that time to see to it that Corsa was "'made aware of the dangers and disadvantages of self-representation,'" United States v. Sacco, 563 F.2d 552, 557 (2d Cir. 1977) and to tell Corsa "that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer." United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

5
The trial judge made no effort whatever to fulfill this duty. He perfunctorily asked Corsa if he had any objection; Corsa said he did not (Tr. 146).

To his credit, the prosecutor was more concerned than the trial judge to protect Corsa's rights, or at least to protect the record. When the judge asked the prosecutor if the Government had any objection, he asked for an opportunity to consider the point; and he affirmatively brought it up again two days later, at the conclusion of the third day of testimony. At that time, he asked the trial judge, "Should there be some kind of waiver? I want to make sure that that's clear on the case." The trial judge said that he had already asked Corsa if it was agreeable, and he asked Corsa again; Corsa again said that it was. The trial judge seemed to think that the problem concerned Marc Rauch alone, and said that there was not much he could do about it if Marc Rauch chose to discharge trial counsel and handle the case pro se. The prosecutor insisted that "my difficulty is making it clear with regard to Larry Corsa." The judge discussed the point with the prosecutor and made it clear that he did not think there was anything further that needed to be done vis-a-vis Corsa. The prosecutor was not so sure: "Whatever Your Honor sees fit. I can see it turning into just the issue I raised," (Tr. 145, 813-6).

It is difficult to understand why the trial judge failed to recognize the problem. Certainly if Corsa had chosen to represent himself with respect to the cross-examination of the Government's expert, the trial judge would have been subject to the duty mentioned above, to see to it that Corsa's decision was voluntary, and was made with some appreciation of its self-defeating shortsighted and stupid nature. Pro se representation is a constitutional right, of course; but the courts repeatedly have made clear that they have at least some obligation to protect the defendants from themselves.

This duty, to protect Corsa from himself, was even more apparent in this case, where Corsa's trial counsel was selected for him by the principal defendant, Corsa's father-in-law, and represented Corsa and Corsa's brother-in-law jointly, under circumstances which raised substantial doubt as to the degree to which the trial counsel was fulfilling his professional and ethical duty to be faithful to the interests of Corsa. (On this point, we respectfully ask leave to adopt the arguments on conflict of interest advanced in the brief which we understand is being submitted by appellate counsel for Marc Rauch.)

The case is no different because the decision Corsa made was to be represented by Marc Rauch rather than to represent himself. If anything, the case is stronger

for the trial judge's duty to intervene, because Corsa, who had a constitutional right to represent himself, did not have a constitutional right, or any right, to be represented by a non-lawyer.

The trial judge could, and should, have refused to permit Corsa to be represented by Marc Rauch with respect to the critical cross-examination of the Government's coin expert. He could, and should, have insisted that Corsa engage counsel who was competent to handle the case, or accept assignment of counsel, or make clear on the record that he knew what he was doing and was doing it on purpose, with adequate advice from some disinterested source, such as the trial judge, as to the folly he was committing.

In the event, Marc Rauch did conduct a reasonable facsimile of a cross-examination of the Government's coin expert. It lasted approximately a day and a half, and was valiant but ineffectual. One reason, perhaps, besides his youth, inexperience and lack of education and training, was his lack of preparation, which was still underway on the evening of the second day of trial (Tr. 385).

Marc Rauch did a better job than anyone had a right to expect; but the opinionated and speculative testimony of the Government's coin expert cried out for effective cross-examination, and an experienced trial lawyer, reading the transcript, can scarcely contain his frustration at the opportunities missed.

Objections were sustained to the offer of inadmissible coin reference works and to incompetent questions innumerable times.* There were frequent side bar and other conferences at which the trial judge attempted to instruct Marc Rauch on the law of evidence.** The trial judge beseeched Corsa's trial counsel to take over the questioning, but he protested, saying, "I can't, I don't know these things" (Tr. 1593). The trial judge asked Marc Rauch, "Do you realize you may be hurting your position by what you are doing? I hope your counsel has explained that to you I am afraid you are jeopardizing your case in the eyes of the jury. . . . Don't you see what that may do to you in the eyes of the jury?" (Tr. 1831-2).

After 336 pages of Marc Rauch's cross-examination, Corsa's trial counsel took over, remarking, in the presence of the jury, that "I don't want to waste any more time" (Tr. 1866) and that "I am not at all qualified on coins" (Tr. 1868).

* E.g., Tr. 1534-6, 1575, 1582, 1599, 1600 (twice), 1617 (twice), 1621, 1643, 1644, 1645, 1649, 1651, 1653-60, 1683, 1742-3, 1771, 1773-4, 1795-6, 1798-9, 1800-1, 1802-3.

**E.g., Tr. 1606-16, 1689-1711, 1785-92 (jury excused); Tr. 1554-9, 1593-4, 1628, 1653-60 (at the sidebar); Tr. 1798-9, 1800-1 (in presence of jury).

Corsa's trial counsel's cross-examination was utterly ineffectual. He was telling the truth when he told the judge that he was not qualified. He was telling the truth again when he stated that Marc Rauch was not qualified either (Tr. 1896). The trial judge stated, "You are beginning to make a mockery of this trial" (Tr. 1887).

There was no affirmative defense respecting the grading and value of the coins. To the trial judge's surprise (Tr. 1478), no independent expert was engaged to consult with the defense or to testify as a defense expert. It cannot be presumed that none was willing. The testimony of the Government expert itself gives ample indication that coin experts disagree with each other all the time about grading and value. Certainly an expert could have been found to defend FCR's good faith, at least; for the differences between FCR and the Government's expert were so slight as almost to establish good faith even without defense evidence. The only explanation offered by Corsa's trial counsel was that "we cannot afford what the Government can afford" (Tr. 1479).

Trial counsel put on two witnesses who might conceivably have been in a position to give evidence on the value of the coins. One was an FCR vendor; Corsa's

trial counsel admitted, even boasted, that he had not interviewed him before putting him on the stand (Tr. 2584-5). The other was Corsa himself, a coin hobbyist since the age of ten, who had been identified during the direct examination of co-defendant Marc Rauch (without objection by Corsa's trial counsel) as the most knowledgeable person about coins at FCR (Tr. 2712). Trial counsel's effort to qualify Corsa as an expert was perfunctory and ludicrous. It is reproduced in the margin.* The entire direct examination of Corsa

* Q [By Mr. Goldman]: What is your background in coins?

A I collected coins since I was about ten years old.

Q When did you become, in your opinion, knowledgeable about coins?

A Not too long after I had started to collect. I basically knew about grading.

Q Did you apply a part of your time, throughout the period from -- when you were ten years old to December 12, 1974, to coins?

A I don't understand the question.

Q Bad question. I withdraw it. Did you continuously collect coins?

A More or less. Sometimes I may have stopped for a couple of months at a time. I would say basically since I was ten until now, as a matter of fact.

Q Do you remember Marc testifying and referring in some testimony to various books on coins?

A Yes.

Q Were you acquainted with those books?

A Yes, absolutely.

Q Did you study those books?

A Yes (Tr. 3213-14).

The Government refused to stipulate that Corsa was a coin expert (Tr. 3223). One juror purportedly remarked in disgust, "I wouldn't either" (Tr. 3430-1).

consumed fourteen pages of this 3700 page transcript (Tr. 3208-23). The attention of the court is respectfully directed to it in its entirety in connection with the claim Corsa adopts to the effect that trial counsel was faithless.

This Circuit has long subscribed to the rather severe rule which permits a conviction to stand no matter how inept the defendant's attorney may have been unless the attorney's conduct was "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

Eight of the eleven judicial circuits have adopted a less stringent test, expressed in language similar to that of the District of Columbia Circuit in United States v. DeCoster, 487 F.2d 1197, 1202 (D. C. Cir. 1973) ("[A] defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").*

*See also, Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977); United States v. Fessel, 531 F.2d 1275, 1278 (5th Cir. 1976); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975); United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom. Sielaff, Corrections Director v. Williams, 423 U.S. 876 (1975); Johnson v. United States, 506 F.2d 640, 646 (8th Cir. 1974) cert. denied, 420 U.S. 978 (1975); Cooper v. Fitzharris, 551 F.2d 1162, 1165-1166 (9th Cir. 1977).

This court has repeatedly declined to reconsider the Wight test. E.g., United States v. Yar' nefsky, 500 F.2d 1327, 1333 n. 2 (2d Cir. 1974); but see, Rickenbacker v. Warden, 550 F.2d 62, 65-66 (2d Cir. 1976), cert. denied, ___ U.S. ___, 46 U.S.L.W. 3215 (1977); United States ex. rel. Marcelin v. Mancusi, 462 F.2d 36, 47-48 (2d Cir. 1972) (Kaufman, J., dissenting); United States v. Tolliver, Nos. 77-1017, 77-2055, slip op. at 877 (2d Cir. Jan. 3, 1978) (applying DeCoster).

Even under the old test, Corsa was deprived of the effective assistance of counsel. The two most important issues in the case were the fair value of the coins and Corsa's good faith belief that the price charged was fair. Corsa's trial counsel, through incompetency admitted and demonstrated, failed to present a case or to attempt to defeat the Government's case on these issues; and the trial judge failed to fulfill his duty to see to it that Corsa's waivers of his right to counsel were made knowingly and voluntarily.

Unconstitutional deprivation of counsel, of course, would be more plainly demonstrated if the new test were adopted. We will not burden the court with yet another brief on the virtues of the new as opposed to the old. The issues are amply ventilated in the opinions cited above. On occasion, the court has given, as one reason for declining to reconsider the question, the fact that the

case at hand was not an appropriate vehicle, because the facts did not justify relief under either test. This case may not be an appropriate vehicle for reconsideration either, for the opposite reason: the facts do justify relief under either test.

Point V

Corsa's Waiver Of Indictment
Was Not Voluntary

The prosecution of Corsa was initiated by an indictment which charged securities fraud in five counts and mail fraud in ten counts. A5-A12.

At a pre-trial conference not attended by Corsa, the trial judge urged the Government to abandon the securities fraud counts to simplify the case ("Why have extra issues for the Jury?" Tr. 3/1/77, at 20).^{*} The Government wanted to preserve the securities fraud mailings, so the trial judge suggested that they be re-alleged as mail-fraud mailings in an amended and superseding information. Sol Rauch pro se, and the trial attorney for Corsa and Marc Rauch, preferred to have the securities fraud counts dismissed. The trial judge coaxed them, however, at several points suggesting irrelevantly that mail fraud was, after all, a lesser included offense of securities fraud, and ultimately they agreed (Tr 3/1/77, at 19-33).

At a second pre-trial proceeding, again not attended by Corsa, written waivers of indictment were executed by the two Rauch's (Tr. 3/8/77, at 10-13).

There is no indication that Corsa was informed of these developments until the first day of trial, after

^{*}The pertinent colloquy is set out in the Joint Appendix at A91-A109.

the jury had been selected. At that time the trial judge told Corsa that "we" had prepared the superseding information, that "officially" it was a charge by the U.S. Attorney rather than the grand jury, that it did not differ "in any material respects" from the indictment, that "technically we cannot go ahead on that without a waiver of indictment from the Defendants," and that the two Rauch's had signed waivers already. The trial judge concluded with this question:

"[M]y question to you is do you also wish to waive the formality of presenting this to the Grand Jury, or what is your feeling?" (Tr. 4-5).

Corsa replied simply, "I will sign" (id.).

The Fifth Amendment provides that "No person shall be held to answer for a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

Constitutional rights may be waived, but the record must show that the defendant "intentionally relinquish[ed]. . . a known right. . . ." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Rule 7(b), Fed. R. Crim. P., permits felonies to be prosecuted by information "if the defendant, after he has been advised of. . . his rights, waives in open court prosecution by indictment."

According to Professor Moore's treatise, the advice as to the defendant's rights "should indicate the

nature of the grand jury and should at least inform defendant of the possibility that the grand jury may decide not to indict him. This advice should be given regardless of whether defendant is represented by counsel at the time" (8 Moore's Federal Practice ¶7.03[2], pp. 7-13 to 7-14 (2d ed. 1977 rev.)).

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights'. . . . This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused," Johnson v. Zerbst, 304 U.S. at 464-465.

The record does not support a finding that Corsa was advised or aware of his rights or that he intentionally relinquished them. The trial judge did not advise Corsa that it was his constitutional right not to be prosecuted if the grand jury chose not to indict him. To the contrary, the trial judge affirmatively misled Corsa into thinking that in waiving indictment he was giving up something of no great value -- a "formality," a "technical[ity]."

It was egregious error for the trial judge thus to misinform Corsa. If a constitutional right can ever be a mere "formality" or "technicality," it was not so in this case. For the fact is, that if Corsa had not signed the

waiver, he could not have been prosecuted in the proceeding then under way, and he might possibly be immune to further prosecution. The jury was already selected. Jeopardy possibly did not yet attach, for the jury had not yet been sworn. But there is no way that the trial of the two Rauchs could have been deferred while the Government presented a Corsas indictment to the grand jury, even if the grand jury were willing to indict Corsas alone, in an artifacts case rather than a meretricious securities case. There would have been a mistrial as to Corsas at least, and quite probably a severance, which would have been especially beneficial to Corsas's chances of getting a fair trial unaffected by his father-in-law's antics and his trial attorney's faithlessness.

That is not all. The record supports a finding that the trial judge affirmatively pressured Corsas into signing the waiver, by referring to the information as something that "we" -- i.e., the judge and the prosecutor together -- "had prepared," and by telling Corsas that his co-defendants had already waived.

Coercion is also implicit in the circumstances. It was the first day of trial. The jury was in the jury room. The Government witnesses were in the witness room. No doubt Government agents and boxes of pre-marked exhibits were on counsel table. It would be surprising indeed if Corsas, age 24 at the time of trial, did not succumb to the seeming inevitability of it all.

It is immaterial that Corsa's trial attorney may have wished Corsa to waive indictment. Even if we assume, against the evidence, that Corsa's trial attorney was faithful and competent, that still does not suffice. Waiver must be personal. Waiver cannot be vicarious, through counsel. See United States v. Clark, 475 F. 2d 240, 247-8 (2d Cir. 1973) ("Even if counsel intended to waive appellant's presence at the hearing. . . appellant's silence in absentia could certainly not be said to have amounted to 'an intentional relinquishment or abandonment of a known right' . . . by him"); United States v. Pandilidis, 524 F.2d 644, 647 n. 3 (6th Cir. 1975), cert. denied, 424 U.S. 933 (1976) (attorney's consent to Government filing bill of particulars to amend indictment held not to constitute waiver of indictment by defendant).

This court has not hesitated to reverse a conviction because of inadequate compliance with the protective rules applicable to waiver of indictment. United States v. Macklin, 523 F. 2d 193 (2d Cir. 1975). Macklin was a harder case than this. Defendant had pleaded guilty to an indictment later realized to have been filed by a grand jury whose term had expired. There was no question as to the voluntariness of the plea of guilty, and it could safely be assumed that the defendant was guilty. "Yet," this court wrote, "the waiver of indictment has been deliberately clothed in formal procedure. It must be made in open court and the defendant must be told the nature of the charge and informed of his rights before he is allowed to consent to the waiver. We cannot erode the

protective formality of the rule because of a hard case."

523 F. 2d at 196.

Point VI

The Chart Which Sets Forth The Government Expert's Opinion As To The Grading And Value Of The Coins, The Manner In Which It Was Used, And The Failure Of The Trial Judge To Give Any Cautionary Instruction Whatsoever, Unfairly Prejudiced The Defendant On The Most Important Issue In The Case.

A key exhibit utilized by the Government was a chart listing the coins purchased by the "victim" witnesses and stating as facts the Government expert's opinions of their grade and price in the year of sale and at the time of trial (GX 163).

Charts have recognized utility in criminal trials and their receipt is admissible in appropriate circumstances, notwithstanding the fact that they are dangerous and must be handled with care. "[T]he use of this type of evidence has inherent dangers to an accused. A jury may be unduly impressed by the apparent authenticity of a Government witness' chart computation, as such, rather than the truth and accuracy of the underlying facts'. . . ." Gordon v. United States, 438 F.2d 858, 876 (5th Cir.), cert. denied, 404 U.S. 828 (1971). "There is great danger that the jury may assume that once the Government has established the figures . . . the crime . . . automatically follows. The possibility of this increases where the jury,

without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." Holland v. United States, 348 U.S. 121, 127-8 (1954).

Charts are customarily used in two types of cases. First, to marshal and summarize numerous bits of data previously received in voluminous documents or lengthy testimony so that the facts may be rendered comprehensible, e.g., Holland v. United States, supra, a tax evasion net worth case. Second, charts may be used to illustrate and make comprehensible a witness's testimony, as, for example, when a handwriting expert points out similarities or dissimilarities between the questioned writing and the exemplar.

GX 163 was not used for either of these purposes. It was received in evidence before the expert testimony which it purported to summarize had even been given. There was no need to assemble bits and pieces of disputed data from many places to make the expert's testimony comprehensible. There was a need to supply the jury with reproductions of the coins, the minute details of which were so important for valuation; but neither GX 163 nor any other Government exhibit was pro-

vided for or served this purpose.

The sole purpose for which GX 163 was utilized was the improper one of underlining and documenting the witness's opinion testimony and making it seem more concrete and real than it might otherwise have been. The Government was well aware that "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them," Holland v. United States, supra, and took advantage of that fact improperly.

The fact that the chart was received in evidence out of order was not cured by the fact that thereafter the Government witness did give the opinion testimony which the chart re-stated. Copies of the chart were distributed to the jury, one for every two jurors, for them to look at while the witness was testifying (Tr. 1486).

The column headings on the chart were prejudicial. They did not indicate that the "bare figures" constituted opinion only. To the contrary, the headings characterized the figures as facts. "Grade" (not "Government witness's opinion of grade") was contrasted with "FCR grade"; "1974 retail price" (not "Government witness's opinion of 1974 retail price") was contrasted with "FCR Price."

The chart had a column for "Current Price" (not "Government witness's opinion of current price"), which was irrelevant, since the information did not allege as false any representations by FCR respecting future price appreciation of the coins being sold. The prosecutor's rationalization of the relevancy of this evidence, when objection was interposed, was disingenuous and fallacious. He said it tended to show that the FCR people were not very good experts, since the coins they sold did not appreciate in value (Tr. 1477).

Because of the inherent danger that the persuasive impact of charts will outweigh their legitimate probative value, trial judges are required to give cautionary instructions on two occasions, when the chart is first received in evidence, and again in the charge to the jury, if the trial judge decides that he is willing to permit the chart to be sent to the jury room like any ordinary exhibit. See, United States v. Nathan, 536 F.2d 988, 992 (2d Cir.), cert. denied, 429 U.S. 930 (1976); Gordon v. United States, supra at 877 ("[P]erhaps most important of all, the jury should be instructed that the summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already admitted; that the jury should examine the basis upon

which the summaries rest and be satisfied that they accurately reflect other evidence in the case; and, if not so satisfied, the summaries should be disregarded"); United States v. Goldberg, 401 F.2d 644, 647-8 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969); United States v. Ellenbogen, 365 F.2d 982, 988 (2d Cir. 1966), cert. denied, 386 U.S. 923 (1967). The trial judge, however, gave no cautionary instruction on either occasion, and the chart was routinely sent to the jury along with all the other exhibits (Tr. 3672, 3677).

Except as indicated above, there was no objection in Corsa's behalf to any of this. Nevertheless, in light of the crucial significance of the opinion testimony which the chart prejudicially re-enforced, the weakness of the Government's case, and the generally incompetent manner in which Corsa was represented by trial counsel, it is respectfully submitted that this is a compelling occasion to invoke the plain error rule. Fed.R.Crim.P.52(b).

Point VII

An Inflammatory And False Remark
By The Prosecutor In Summation
Requires Reversal

The prosecutor stated in summation that:

"We only had thirteen and with two additional ones at the end, 15 victim witnesses. We could have called 500 people and gotten a real good view of the company. Do you think that was necessary? Did you see a common pattern or threat through the individuals that the Government called?" (Tr. 3621).

This was false. The Government did not have 500 victim witnesses it could have called. FCR only had 500 customers in its short life. Only improper hearsay testimony indicated that there had been as many as 70 complaints (Tr. 3300).

Even if it was not false, it was improper. The prosecutor may never state in testimonial fashion what evidence he could have offered but did not.

The defense promptly objected (Tr. 3622) and moved for a mistrial (Tr. 3626). The trial judge denied the motion on the ground that the prosecutor's remark, as he recalled it (he did not ask for it to be read back to him) "was they could have brought in all the 500 customers that Federal had and I think he said then we will then have a complete picture of the operation of Federal Coin" (Tr. 3626).

The trial judge did not recall the remark accurately. The mistrial motion should have been granted. "[A]ssertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1935); Accord, United States v. Burse, 531 F.2d 1151, 1153-5 (2d Cir. 1976); United States v. Dardi, 330 F.2d 316, 334 (2d Cir. 1964), cert. denied, 379 U.S. 845 (1965).

The prosecutor sought to justify his remark as a response to argument in summation by pro se co-defendant Sol Rauch respecting uncalled witnesses (Tr. 3621). But the justification is not supported by the record and does not cure the error for the trial judge promptly and vigorously sustained the prosecutor's objection and cut Rauch short (Tr. 3614-5). See, United States v. Robinson, 543 F.2d 951, 965-6 (2d Cir.), cert. denied, ___ U.S. ___, 97 S. Ct. 139 (1976); United States v. Curtiss, 330 F.2d 278, 281 (2d Cir. 1964).

Point VIII

Prejudicial Hearsay Testimony Was Elicited By The Prosecutor On Direct Examination Of The Receiver Appointed For FCR Long After The Alleged Scheme Had Terminated.

The Government called as a rebuttal witness the court-appointed receiver of FCR and elicited from him on direct examination testimony to the following effect:

(a) The SEC gave him a list of 70 customers who had not received coins or refunds; (b) he received unsolicited telephone calls and letters from 30-45 customers, some of which were complaints; (c) Corsa's trial attorney and Corsa's co-defendants Sol and Marc Rauch resisted efforts to obtain possession of FCR's books and records; (d) the condition of those records was deplorable when he finally did obtain them; and (e) the company had virtually no assets (Tr. 3289-3302).

This testimony was inadmissible and highly prejudicial. The SEC's list, and the letters and telephone calls to the receiver, are hearsay. The suspicious behavior of Corsa's trial attorney and co-defendants and the condition of FCR and its books more than a year after FCR had been shut down by the injunction and the scheme alleged in the indictment had ended were in no way connected to Corsa. It is particularly deplorable that the Government

gratuitously impugned the integrity of Corsa's trial counsel.*

Conclusion

The judgment of conviction should be reversed
and the information dismissed.

Respectfully submitted,

JACK KAPLAN
Attorney for Defendant-Appellant
Lawrence Corsa
2 Wall Street
New York, New York 10005
(212) 732-3200

Peter J. Romatowski
Jonathan D. Britt
Carter, Ledyard & Milburn
of counsel

* Leave of court is respectfully requested to adopt arguments which we understand are being made by appellate counsel for Marc Rauch dealing with improper jury selection, improper rebuttal, improper receipt and use of hearsay testimony by the "victims" to the effect that their local coin dealers told them that FCR had over-charged them, and Corsa's and Marc Rauch's common trial counsel's conflict of interest.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA :
Plaintiff-Appellee, :

-against- :

SOL RAUCH, MARC RAUCH & LAWRENCE CORSA :
Defendants-Appellants. :

AFFIDAVIT
OF
MAILING

----- x
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PETER J. ROMATOWSKI

, being duly sworn,

deposes and says that he is over the age of eighteen years
and is not a party to this action.

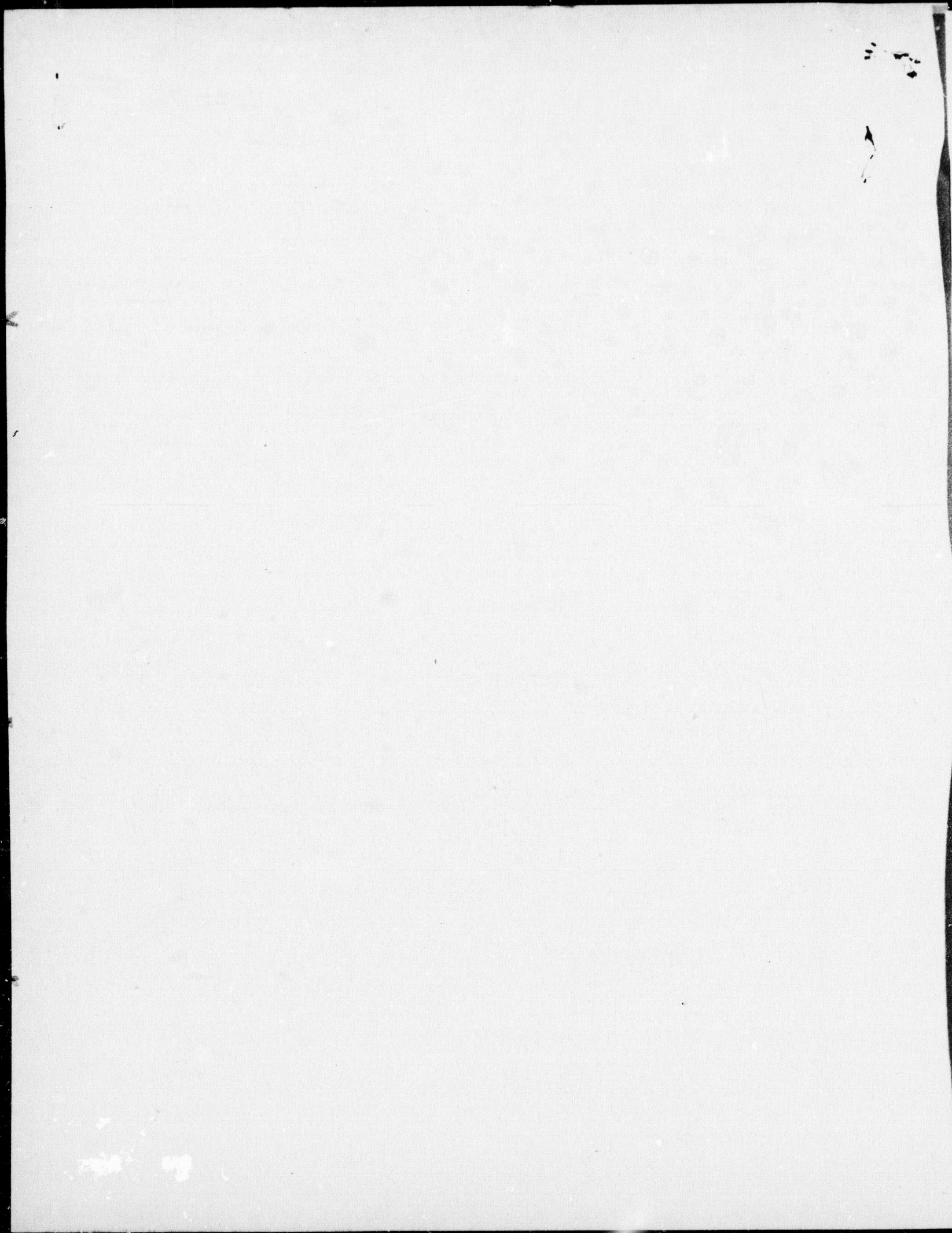
That on the 31st day of January, 1978 he
served ² ~~x~~ true copy^{ies} of the annexed Brief of Defendant-Appellant
Lawrence Corsa

by placing the same in ~~x~~ first class postpaid envelopes
addressed:

ALVIN SCHALL
Assistant United States
Attorney
225 Cadman Plaza East
Brooklyn, New York

DONALD E. NAWI
29 Iselin Drive
New Rochelle, New York

Joseph P. Hoey, Esq.
Brady, Tarpey, Hoey
84 Williams Street
New York, New York
10038



And deponent further says that on said day, he deposited the said envelopes in an official mail depository maintained and controlled by the United States at 90 Church Street, New York, New York.

Th. J. Romatosh.

Sworn to before me this
31st day of January, 1978

Jonathan Deaderick Britt

Notary Public

JONATHAN DEADERICK BRITT
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4636016, Qualified in New York Co.
Commission Expires March 30, 1978